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ATTORNEYS FOR APPELLEE:

**STEVE CARTER**  
Attorney General of Indiana

**JESSICA A. MEEK**  
Deputy Attorney General  
Indianapolis, Indiana

**IN THE  
COURT OF APPEALS OF INDIANA**

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No. 03A01-0707-CR-308

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT  
The Honorable Roderick McGillivray, Judge  
The Honorable Joseph W. Meek, Magistrate  
Cause No. 03D02-0607-CM-936

**January 9, 2008**

**BRADFORD, Judge**

Appellant-Defendant Joshua E. Gale appeals the trial court's imposition of a ninety-day executed sentence, following his guilty plea to Driving While Suspended as a Class A misdemeanor.<sup>1</sup> Gale presents the following issues on appeal: (1) whether the trial court erred in sentencing Gale by failing to consider and appropriately weigh all of the significant mitigating factors which he claims were clearly supported by the record; and (2) whether the trial court's sentencing statement, which allegedly included facts which were not supported by the record, showed that the court was biased against Gale. We affirm.

## **FACTS AND PROCEDURAL HISTORY**

On May 17, 2006, Gale was arrested for driving while his driving privileges were suspended. The State charged Gale with driving while suspended as a Class A misdemeanor. Gale initially pled not guilty and requested a jury trial but subsequently changed his plea to guilty on May 30, 2007. On June 6, 2007, the trial court sentenced Gale to ninety days of incarceration.

## **DISCUSSION AND DECISION**

### **I. Sentence**

Gale argues that the trial court abused its discretion by not considering and appropriately weighing all of the significant mitigating factors. Appellant's Brief at 3, 5-7. In effect, Gale argues that the trial court did not place enough emphasis upon his

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<sup>1</sup> Ind. Code § 9-24-19-2 (2006).

remorse, his guilty plea, and the undue hardship his incarceration would impose upon his dependents.

A trial court, however, is not required to articulate and balance aggravating and mitigating circumstances before imposing a sentence on a misdemeanor conviction. *Id.* (citing *Stewart v. State*, 754 N.E.2d 608, 613 (Ind. Ct. App. 2001)). Therefore, because the trial court was not required to articulate and balance any aggravating or mitigating circumstances before sentencing Gale, we cannot conclude that the trial court abused its discretion by failing to do so.

## **II. Judicial Bias**

Gale argues that the trial court demonstrated its alleged bias against him by inappropriately considering facts that were never introduced into evidence at sentencing. At the sentencing hearing, the trial court stated:

I'm not sure he is [a] standard defendant because as I recall we were set for a pretrial and Mr. Gale didn't think this case was worthy enough for him to appear. It was just a driving while suspended and he asked that the deputies not bring him over. So I'm not sure he is the standard defendant in this case. Based on the evidence and the testimony presented the court's going to sentence the defendant as follows, ninety days executed to the Bartholomew County Jail.

Tr. at 30-31. Gale contends that this statement shows that the trial court was biased against him in that review of the record suggests that he appeared before the court at all hearings held before the court prior to sentencing.

When a defendant claims judicial bias, the law will presume that the judge was unbiased and unprejudiced in the matters that come before the judge. *Timberlake v. State*, 753 N.E.2d 591, 611 (Ind. 2001); *Flowers v. State*, 738 N.E.2d 1051, 1060 (Ind.

2000). A judge has the discretionary power to disqualify himself or herself *sua sponte* whenever any semblance of judicial bias or impropriety comes to the judge's attention. *Flowers*, 738 N.E.2d at 1060. In addition, where a judge harbors actual prejudice in a case, justice requires that a *sua sponte* judicial disqualification from the case be made. *Id.*; see also Ind. Judicial Conduct Canon 3(E)(1)(a) (providing that when a judge's impartiality might reasonably be questioned because of personal bias against a defendant or counsel, a judge is to recuse himself). The test for determining whether a judge should recuse himself or herself under Judicial Canon 3(E)(1) is whether “an objective person, knowledgeable of all the circumstances, would have a reasonable basis for doubting the judge's impartiality.” *Timberlake*, 753 N.E.2d at 611 (quoting *In re Edwards*, 694 N.E.2d 701, 711 (Ind. 1998)). Furthermore, the record must show actual bias and prejudice against the defendant before a conviction will be reversed on the ground that the trial judge should have been so disqualified. *Flowers*, 738 N.E.2d at 1061.

We disagree with the notion that the trial court's statement demonstrated bias or prejudice. First, Gale did not object to the statements at the sentencing hearing. Where a defendant fails to object to comments a trial judge makes during the proceedings, the issue is waived for review. *Id.* Gale's claim fails, however, waiver notwithstanding. In order to successfully show judicial bias, a defendant must show that the trial judge's action and demeanor crossed the barrier of impartiality and prejudiced the defendant's case. *Id.* Here, Gale has made no such showing. Furthermore, the sentence imposed by the trial court was well within the permissible penalty limits for convictions for Class A

misdemeanors, and as such, we are not convinced that Gale was prejudiced by the trial court's statements.

The judgment of the trial court is affirmed.

BAKER, C.J., and DARDEN, J., concur.